

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

76-202

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To be argued by:
PHYLIS SKLOOT BAMBERGER

LYMAN T. SHEPARD,

Appellant,

-against-

UNITED STATES BOARD OF PAROLE,

Appellee.

No. 76-2021

BRIEF FOR APPELLANT

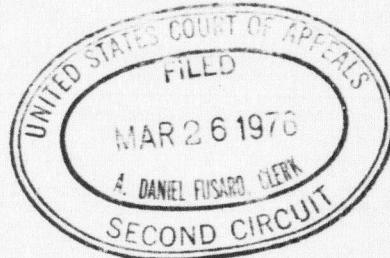
ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

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STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This appeal is from an order of the United States District Court for the Northern District of New York (The Honorable James T. Foley) entered on December 19, 1975, denying a petition for writ of habeas corpus. The District Court granted a certificate of probable cause and leave to appeal in forma pauperis on January 14, 1976. (Docket Number 16 to Record on Appeal).

This Court assigned the Legal Aid Society - Federal Defender Service's Unit as counsel for this appeal.

STATEMENT OF FACTS

On July, 1972, appellant was sentenced for violation of 18 U.S.C. §2312, the interstate transportation of a stolen car, as a Youth Offender to a term of 0-6 years imprisonment. On April 18, 1974, appellant was released on parole. On December 17, 1974, he was sentenced by the New York State Courts to a term of up to four years in custody for attempted robbery in the second degree committed while he was on parole.

On January 10, 1975, while appellant was incarcerated at the New York State Correctional Facility at Dannemora, New York, the United States Board of Parole

lodged against the appellant a parole violation detainer. Appellant requested a revocation hearing to present evidence in explanation or mitigation of the charges.

On July 23, 1975, appellant received a letter from an acting Senior Analyst of the Board of Parole advising him that the Board intended to review his case in 120 days, and that if the detainer was not removed at that time, the case would be reviewed again in one year.*

No hearing has even been granted by the Parole Board.

Appellant asserts that the detainer caused him to be denied privileges at the institution, denied participation in college education programs and temporary release programs, will deny to him the opportunity to defend against the charges and may expand the length of his period of custody.

Judge Foley denied the writ, stating:

This court has reviewed challenges of this kind most recently in a memorandum decision and order dated October 15, 1975, in United States ex rel. Martinez v. Crawford, 75-CV-503. The challenges are increasing and ruling by the Court of Appeals, Second Circuit, on such questions would be helpful. In the Martinez

* The petition also refers to an attached letter from the Board dated August 14, 1975. However, it is not included in the papers.

case, I concluded habeas corpus did not lie as the correct remedy; that significant differences existed between Morrissey and that of Martinez, in their cases noted above, in that Morrissey involved a state parolee, rather than a federal parolee as in the Martinez case and as here, and neither parolee in Morrissey had been convicted of a criminal offense violative of his parole. These differences, this court held, were pointed up in Gaddy v. Michael, 519 F.2d 669 (4th Cir. 1975). This court then concluded that the distinctions were valid and persuasive and that no inflexible time limit for parole revocation hearings applied to the United States Parole Board. In petitioner's case, the letter of the United States Board of Parole indicates that review of petitioner's case is ongoing.*

ARGUMENT

POINT I

THE PROMPT PAROLE REVOCATION HEARING REQUIRED BY MORRISSEY v. BREWER MUST BE AFFORDED A PAROLEE WHO COMMITS A NEW CRIME WHILE ON PAROLE.

A. Introduction

This case presents the issue of whether Morrissey v. Brewer, 408 U.S. 471 (1972), requires a timely due process hearing where the parolee has been convicted of a new crime and the United States Board of Parole has lodged a detainer against the parolee in the custody of an other jurisdiction. Morrissey provides clear grounds for concluding that a timely parole revocation hearing with due process procedures is necessary

* The opinion is annexed as "B" to appellant's separate appendix.

for the Board to render a disposition even if it is established that a parolee has violated parole by committing a new crime. Morrissey excludes from relitigation before the Board only the fact of the new conviction. Other circumstances, those affecting disposition must be considered by the Board. 408 U.S. at 490. Taking well founded instruction from Morrissey, courts have concluded that the same rights accorded other parolees apply as well to those convicted of new crimes. Hahn v. Revis, 520 F.2d 632 (7th Cir. 1975); Cleveland v. Ciccone, 517 F.2d 1082 (8th Cir. 1975); Cooper v. Lockhart, 489 F.2d 303, 312-313 (8th Cir. 1973); Arnold v. United States Board of Parole, 390 F. Supp. 1177 (D.D.C. 1975); Pavia v. Hogan, 386 F. Supp. 1379 (N.D.Ga. 1974); Morden v. United States Board of Parole, 376 F. Supp. 226 (W.D.Mo. 1974); Fitzgerald v. Siegler, 372 F. Supp. 889 (D.D.C. 1974), appeal pending, sub. nom. Byrd v. Fitzgerald, D.C. Cir. Doc. No. 74-1517; Jones v. Johnston, 368 F. Supp. 571 (D.D.C. 1974); appeal pending, D.C. Cir No. 74-1517; Sutherland v. D. C. Board of Parole, 366 F. Supp. 270 (D.D.C. 1974); United States ex rel. Hitchcock v. Kenton, 256 F. Supp. 296 (D. Conn. 1966).

On the other hand other circuits have taken two other positions on the matter. One position is that the hearing can be delayed until the completion

of the intervening sentence on the new conviction. Colangelo v. United States Board of Parole, No. 75-1249 (6th Cir. July 16, 1975, affirming, Civ. No. 74-251 (N.D.Ohio December 20, 1974) (annexed as Appendix "D")); Gaddy v. Michael, 519 F.2d 669 (4th Cir. 1975); Trimming v. Henderson, 498 F.2d 86 (5th Cir. 1974), cert. denied, 420 U.S. 931 (1975); Burnett v. United States Board of Parole, 491 F.2d 967 (5th Cir. 1974); Cook v. Attorney General, 488 F.2d 667 (5th Cir. 1974). The other is that relief will be granted if a hearing is unreasonably delayed and if the parolee can show grievous loss due to the delay. Orr v. Saxbe, No. 75-1042 (3d Cir. June 10, 1975), affirming Civ. No. 74-341 (M.D.Pa. November 27, 1974) (annexed as Appendix "C")); Small v. Britton, 500 F. 2d 299 (10th Cir. 1974).

The Supreme Court has granted certiorari in Moody v. Daggett, Docket No. 74-6632, to resolve this conflict,* one recognized by Judge Foley below, as he chose to follow Gaddy v. Michael, supra, to deny the writ, while at the same time requesting guidance from this Court.

Appellant's position is that Morrissey expressly applies to this situation; that Morrissey applies because

* The Solicitor General has taken the position that no hearing need be given under any circumstances.

the Board's rules permit dispositions other than to the loss of liberty if the parolee is a good risk; that the presence of a detainer adversely affects the parolee's prison status in the custodial jurisdiction; that the decisions denying Morrissey's applicability are logically incorrect, and the problems those cases envision as a result of Morrissey doctrine are illusory.

B. The procedures governing revocation

Under the 18 U.S.C. 54205 and the Rules of the United States Board of Parole, 28 C.F.R. 52.49(a) a parole violation warrant is issued when a parolee violates parole and satisfactory evidence of the violation is presented to the Board. For the period between issuance of the warrant and the date of arrest of the parolee and his return to custody, that is execution of the warrant, (18 U.S.C. 54205; 28 C.F.R. 552.51, 2.52(a)), the parolee is considered to be a fugitive, and he receives no credit as against his sentence. The parolee is credited with the time from the date of the execution of the warrant.

Under 28 C.F.R. 52.55(c) and 52.56(b), upon a finding of a parole violation, the United States Board of Parole has the option of reinstating the parolee to

supervision or revoking his parole. Under 18 U.S.C. §4207 and 28 C.F.R. §2.56, a hearing is held to determine if a violation has occurred. The finding of a violation does not require revocation (18 U.S.C. §4207; Esquivel v. United States, 414 F.2d 607, 608 (10th Cir. 1969); Brown v. Taylor, 287 F.2d 334 (10th Cir. 1961), cert. denied, 366 U.S. 970 (1962); United States ex rel. Obler v. Kenton, 262 F. Supp. 205, 208 (D.Conn. 1967); United States ex rel. Vance v. Kenton, 252 F. Supp. 344, 346 (D.Conn. 1956); Parole Revocation in the Federal System, 56, Geo. L.J. 705, 731, 735-736 (1968)), and if the Board chooses to reinstate the parolee to supervision,

. . . the person is released to further supervision in the community, and the time between the issuance of the warrant and his return to the community is counted toward the running of his sentence.

Annual Report, THE UNITED STATES BOARD OF PAROLE
(July 1, 1972 - June 30, 1973 at 27)

On the other hand, the effect of revocation is loss of credit for the time from the date of release on parole (18 U.S.C. §4205; 28 C.F.R. §2.51; Peacock v. Hughes, 427 F.2d 359 (5th Cir. 1970); Canavari v. Richardson, 419 F.2d 1287 (9th Cir. 1969), and cases cited therein), as well as good time. McKinney v. Taylor, 358 F.2d 689 (10th Cir. 1966).

Further, the Board can compel the parolee to serve any unexpired time up to the maximum release date* (18 U.S.C. §4207), and does, at the time of the revocation decision, set a re-parole date or a reconsideration date. To the parolee, the significance of this proceeding is obviously enormous.

When the violation is based on a new conviction which results in an intervening sentence, the Board functions pursuant to its rule, 28 C.F.R. §2.53.** Under that Rule, the Board takes the position, as it did

* "Unexpired term" means the number of days of the sentence remaining as of the date of parole. McKinney v. Taylor, supra, 358 F.2d at 690.

** The relevant rule of the Board of Parole appears at 28 C.F.R. §2.53:

§2.53 Warrant placed as a detainer and dispositional interview.

(a) In those instances where the prisoner is serving a new sentence in an institution, the warrant may be placed there as a detainer. Such prisoner shall be advised that he may communicate with the Board relative to disposition of the warrant, and may request that it be withdrawn or executed so his violator term will run concurrently with the new sentence. Should further information be deemed necessary, the Regional Director may designate a hearing examiner panel to conduct a dispositional interview at the institution where the prisoner is confined. At such dispositional interview the prisoner may be represented by counsel of his own choice and may call witnesses in his own behalf, provided he bears their expense. He shall be given timely notice of the dispositional interview and its procedure.

(Continued on next page)

here, that no parole revocation hearing need be given until the intervening sentence, regardless of length, is completed. Where a parolee is already in custody on another charge or conviction, the Board lodges the parole violation warrant as a detainer against the parolee.* When the detainer is lodged, the parolee may communicate with the Board request-

(Footnote continued from last page):

(b) Following the dispositional review the Regional director may:

- (1) Let the detainer stand;
- (2) Withdraw the detainer and close the case if the expiration date has passed;
- (3) Withdraw the detainer and reinstate to supervision; thus permitting the federal sentence time to run uninterruptedly from the time of his original release on parole or mandatory release;
- (4) Execute warrant, thus permitting the sentence to run from that point in time. If the warrant is executed, a previously conducted dispositional interview may be construed as a revocation hearing.

(c) In all cases, including those where a dispositional interview is not conducted, the Board shall conduct annual reviews relative to the disposition of the warrant. These decisions will be made by the Regional Director. The Board shall request periodic reports from institution officials for its consideration.

* It must be recalled that from the moment of issuance of the warrant, the parolee is receiving no credit, and that since he is not in custody, that status continues.

ing either withdrawal of the warrant or execution of the warrant. A "review" is granted. Only at the Board's discretion if further information is "deemed" necessary will a "dispositional interview" be held at the institution of custody.* After the review or interview, the Board can let the detainer stand, withdraw it or execute it. The effect of withdrawal is to credit the parolee with time from the date of his original release on parole. In substance, then, if a parole violation warrant is withdrawn, it is as if no warrant issued, and the parolee is simply continued on parole. Parole runs while the parolee is in the custody of another jurisdiction on the intervening sentence.

If the warrant is executed, the parolee is serving the parole sentence and the new sentence simultaneously, he receives concurrent credit from the moment of execution. 28 C.F.R. §2.53; Melson v. Sard, 402 F.2d 653, 654 (D.C.Cir. 1968); Smith v. Rivers, 388 F.2d 567, 575 (D.C.Cir. 1967); Mock v. United States Board of Parole, 345 F.2d 737 (D.C.Cir. 1965); Hash v. Henderson, 262 F. Supp. 1016, 1020 (E.D.Ark. 1967); see letter of Parole Board attorney in Edwards v. United States, 422 F.2d 856, 858 (6th Cir. 1970).

The Board under its rules can refuse to withdraw or execute without any interview.

* No such interview occurred here.

If the warrant remains in effect, annual "reviews" are given.

As has been found elsewhere, it is the policy of the Board of Parole to delay parole revocation hearings on detainees lodged against those serving intervening sentences until the completion of those terms of imprisonment. Cleveland v. Ciccone, supra; United States v. Louzon, 392 F. Supp. 1220, 1226, 1228 (E.D.Mich. 1975); Gaddy v. Michael, 384 F. Supp. 1390 (W.D.N.C. 1974), rev'd, Gaddy v. Michael, supra; see also, Reese v. Board of Parole, 498 F.2d 698 (D.C.Cir. 1974). This procedure is intentionally used by the Board, and included by the Board in its policy statement:

Where a violation of parole or mandatory release is charged on the basis of a new crime on which he has been sentenced by a Federal or other court, the prisoner will ordinarily be required to serve the period of that sentence before the hearing is held on such violation, and his violator time will be served consecutively to the new sentence.

RULES OF THE UNITED STATES
BOARD OF PAROLE, Effective
January 1, 1971, at 34.

C. The procedures of the Board of Parole do not comply with Morrissey or due process

Appellant alleges that he requested a parole revocation hearing from the United States Board of Parole.

In response, the Board wrote to appellant that his case would be reviewed within 120 days, and if the detainer was not removed the case would be reviewed annually. The petition further alleges that he was never given a hearing. Apparently, the "review" procedure was the only process given to appellant.*

It is nowhere asserted that the review procedure is comparable to a due process hearing. It is unclear precisely what a review entails. There is no time requirement within which the review must be conducted and apparently it must be initiated by a request of the parolee. Under 28 C.F.R. §2.53(c), the review is limited to institutional reports supplied by prison officials. The parolee is not given the opportunity to see those reports or to contradict or correct them if they are incorrect, or to request additional information. The proceeding does not require the parolee's presence. While review permits the parolee to communicate with the Board, there is no requirement that the Board consider the communications from the parolee,** and no provision for presentation of evidence, calling of witnesses, or assistance to the parolee. Nor is a written statement or explanation of the reasons for a decision to continue the detainer required. The response from the Board is usually a pro forma one that the de-

* The letter of August 23 might well provide this information.

** The Solicitor General concedes in his memorandum in Moody that the Board is free to ignore any facts.

tainer will remain in effect. Forms used by the Board are annexed as "D". This type of proceeding has been held to be inadequate where release to liberty is at stake (Grasso v. Norton, 520 F.2d 27 (2d Cir. 1975); or where conditions of confinement are made more restrictive (Wolff v. McDonnell, 418 U.S. 539 (1974); Cardaropoli v. Norton, 523 F.2d 990 (2d Cir. 1975)).

Further, the "interview" granted also fails to comply with due process requirement. It is purely discretionary, and can be denied no matter what communications are before the Board and notwithstanding a request from the parolee. While the parolee can produce witnesses, he must do so at his own expense without the advantages of compulsory attendance of those witnesses. For most parolees, this is meaningless. They are in custody, often long distances from the locations of their witness, and may be unable to bear the costs of the transportation of those witnesses to the institution. Again, there is no requirement that the Board advise the parolee of the unfavorable information being used against him or that he be given an opportunity to explain or contradict it. There is also no requirement of an explanation for the Board's decision.

The Morrissey due process requirements require substantially more than is given here which is in reality

nothing more than a reading of the records that the custodial institution chooses to forward to the Board.

D. Due Process requires a hearing be granted

It is now beyond challenge that principles of due process apply to parole revocation proceedings where parole is to be revoked, or reinstated (Morrissey v. Brewer, 408 U.S. 471, 482 (1972)). Due process includes a preliminary hearing as promptly as is convenient after arrest (Id. at 485) and a timely final revocation hearing (Id. at 488). Further, it is envisioned in Morrissey that the final parole revocation hearing is to determine both whether there has been a violation of parole and, in the event of a finding of violation, determination of the appropriate disposition (408 U.S. at 479-80, 483-4, 488):

If it is determined that the parolee did violate the conditions . . . , the second question arise[s]: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation? The first step is relatively simple; the second step is more complex. The second question involves the application of expertise by the parole authority in making a prediction as to the ability of the individual to live in society without committing antisocial acts. This part of the decision, too, depends on facts, and therefore it is important for the board to know not only that some violation was committed but also to know accurately how many and how serious the violations were.

Yet this second step, deciding what to do about the violation once it is identified, is not purely factual but also predictive and discretionary.

Id., 408 U.S. at 480.

The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation.

Id., 408 U.S. at 483.

Morrissey provides the basis for the generally held conclusion that the timely opportunity to present mitigating circumstances and to affect the Board's disposition of the case is part of the due process afforded to parolees.

Preston v. Priggman, 496 F.2d 270, 273-4 (6th Cir. 1974);

Caton v. Smith, 486 F.2d 733, 735 (7th Cir. 1973).

In this Circuit, the requirement of a prompt parole revocation hearing preceded Morrissey. The Connecticut District Court has been unequivocal in its protection of the rights of the parolee. Thus, in United States ex rel Vance v. Kenton, 252 F. Supp. 344, 346 (D. Conn. 1966), the Court said:

[The] petitioner's admission of violation [is not] an extenuating circumstance which, as the respondent argues, excuses the delay. Whether or not there has been a transgression is only the first of two decisions which must be reached following a Section 4207 hearing. Loss of parole status and reincarceration are not automatic consequences of parole infraction.

The statute also requires the Board to determine whether the violator is still a good parole risk. A breach of the release conditions is but one element, albeit often a forceful one, to be considered. The parolee may bring other factors to the attention of the Board which may induce it to give him another chance. [Citations omitted].

An accused violator, therefore, should be presented within a reasonable time not only to respond to the charges against him, United States ex rel. McCreary v. Kenton, 190 F.Supp. 689, 691 (D.Conn. 1960), but also to attempt to convince the Board that, notwithstanding the violation, his parole should be continued under the same or some other terms and conditions. Months of incarceration prior to the hearing, in addition to being fundamentally unfair, effectively nullify this opportunity.

See also Jenkins v. United States, 337 F. supp. 1368 . D.C.Conn. 1972); United States ex rel. Buono v. Kenton, 287 F.2d 534 (2d Cir. 1961), cert. denied, 368 U.S. 846 (1961).*

As recognized by Morrissey, the parolee's continued liberty is not determined solely by a finding of violation - but the Board must make the further finding as to whether the parolee would be a good risk in order to determine whether to revoke. This can be affected by the evidence which can be produced by the parolee, with respect both to the violation and other circumstances of his personal life while on parole. Thus, due process applies to the entire proceeding.

* See discussion infra at 32 .

From this Circuit, United States ex rel. Hitchcock v. Kenton, 256 F. Supp. 296 (Conn. D.C. 1966), was an early and leading exponent of what became the principle of Morrissey. In Hitchcock, a parolee who had admitted committing a new crime while on parole was sentenced to a suspended sentence. Ultimately the United States Board of Parole granted a long delayed hearing after Hitchcock had filed a petition for writ of habeas corpus. After the hearing, the Board made no determination as to whether the parolee was a good risk and merely revoked parole. The district court, granting the petition for writ of habeas corpus found that Hitchcock was deprived by the delay in the hearing of evidence which would have affected the Board's disposition. The district judge found that the new crime was not enough to justify revocation and that the Board's procedures deprived the parolee of the opportunity to present mitigating evidence.

In cases in which the parolee has been convicted of a new crime, the parolee's liberty is affected by the Board's decision even though the parolee is in custody for the new crime. Wolff v. McDonnell, 418 U.S. 539, 556 (1974). The opportunity to present mitigating evidence is critical to any decision on concurrency, and concurrency

obviously reduces the length of physical custody or parole on the parole violation sentence. Wolff v. McDonnell, supra, 418 U.S. at 556. Further, the pendency of the detainer affects the severity and level of the custody for the intervening sentence. A detainer can require custody in a more secure institution, can deprive an inmate of the opportunity to participate in special prison programs, work release or educational release programs, furloughs, or it can affect parole release.

In Cooper v. Lockhart, supra, the Court of Appeals expressed with clarity the principle of Morrissey:

It has been urged that the possible loss of individual liberty, which was the focal thrust of Morrissey, is not present in a detainer situation because the individual is already incarcerated. In other words, regardless of any favorable decision as to the parole revocation, that decision cannot affect the present confinement. This argument, we think, violates the intended spirit of Morrissey and the later decision of Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L.Ed. 2d 656 (1973).

The Supreme Court has observed:

"Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law. Society thus has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness."

* * *

This possibility is just as much obscured and "forever lost" if a parole revocation hearing is postponed.

* * *

It is possible to argue (1) that a revocation hearing is needless since in most every case the detainer request will be placed because the petitioner has violated his parole through conviction of another felony . . .

[This] consideration could be a real one, if it were a foregone conclusion that revocation and reincarceration would always result. However, this is not so. There are many possible alternatives. First, notwithstanding the conviction in another state, the Board of Parole may well waive revocation. This often occurs today but the decision to waive revocation is not decided until the prisoner is about to be released by the detainer state. The result is that because of the detainer, the prisoner is released without having been given the opportunity for rehabilitation in prison.

Second, the argument that parole revocation and imprisonment will automatically follow upon release overlooks the concern of the Supreme Court "that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving . . .

Cooper v. Lockhart, supra,
489 F.2d at 314-316.

Hahn v. Revis, 520 F.2d at 637, expressed the identical view:

Obviously, there is no point in relitigating the fact that a violation occurred. Yet it is not a foregone conclusion that parole will be revoked. Gagnon v. Scarpelli, 411 U.S. 778, 784, n.8 . . . (1973).

This is true even when the violation involves serious criminal conduct. Dawson [Sentencing: The Decision as to Type, Length and Conditions of Sentence 283], 369-74 [1969]. Accordingly, notwithstanding incarceration for another offense, the violator has a substantial interest in presenting facts in mitigation of the violation that would influence the Board either to set aside the violation warrant or execute it giving him the benefit of concurrent sentences.

See also Cleveland v. Ciccone, supra, 517 F.2d at 1087.

In Fitzgerald v. Siegler, supra, the District of Columbia District Court found no distinction between a violation based on a new crime and other violations:

The respondents would distinguish the instant case from Morrissey by limiting the latter solely to its own facts, which did not deal with a parolee in custody by reason of a criminal conviction. However, that the Court was mindful of such a parolee is indicated by a remark made in the course of delineating the limits of the due process hearing: "Obviously a parolee cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based on conviction of another crime." 408 U.S. at 490, 92 S. Ct. at 2605. To this Court the plain import of that language is that the mandate of a prompt, final revocation hearing is not obviated, but only that the content of such a hearing might be altered, by the fact of a conviction while on parole. For instance, the first-stage preliminary hearing required by Morrissey would surely be met by the fact of the intervening conviction and sentence. But according to Morrissey, there would have to be a second-stage final hearing in all cases and within a reasonable time to satisfy due process.

In view of the above, then, it seems clear that the Board no longer has any discretion as to whether to grant a prompt parole revocation hearing. Such discretion as is lodged in the Board is related to what disposition to make in each case after and as a result of the hearing. But there must be a final hearing.

(372 F. Supp. at 898)

Indeed, in two earlier decisions (Sutherland v. District of Columbia Board of Parole, 366 F. Supp. 1270 (D.D.C. 1973); Jones v. Johnston, 368 F. Supp. 571 (D.D.C. 1974)) of the same Court, it was held that Morrissey overruled that part of a decision of the Court of Appeals of the District of Columbia (Shelton v. United States Board of Parole, 388 F.2d 567 (D.C. Cir. 1967)) which excepted from the requirement of a prompt revocation hearing those cases in which the parolee had a new conviction and were serving an intervening sentence.* Thus, Jones reiterated what had been earlier said in Sutherland:

[Shelton] misconceives the duties of the Parole Board and permits the imposition of substantial deprivations without due process of law.

[2] The D. C. Board of Parole, like the United States Parole Board under discussion in Shelton, retains full discretion to place a parolee back on the street even though he has clearly violated the conditions of his parole...

* Shelton was a leading case in other aspects of parole law development. It was one of the first statements that the issuance of a violator warrants, and not its execution, triggers a procedure which as a matter of fundamental fairness must be pursued with reasonable diligence and with reasonable dispatch. See also Hyser v. Reed, 318 F.2d 225 (1963). See discussion infra at 29-30.

The Board must consider mitigating circumstances and rehabilitative potential as well as the existence of parole violations before determining that reincarceration is appropriate. Cf. United States ex rel. Hitchcock v. Kenton, 256 F. Supp. 296 (D. Conn. 1966). Thus, a revocation hearing to adduce evidence on these matters is of vital importance even to a parolee whose parole violation has already been established by a court of law. Moreover, delay in holding the hearing could substantially prejudice such a parolee. Not only might mitigating evidence be lost during the hours of intervening incarceration, see Jenkins v. United States, 337 F. Supp. 1368 (D. Conn. 1972), but the parolee could be arbitrarily deprived of the opportunity to have his reincarceration, if ordered, run concurrently with the remainder of his intervening sentence. The maintenance of a detainer against an inmate whose parole will never actually be revoked has other undesirable effects, triggering an unnecessary loss of prison privileges and hampering rehabilitation by placing the parolee's future into a state of prolonged uncertainty.

The delay in the hearing deprives the parolee of the opportunity to present evidence that would persuade the Board that execution of the detainer with resulting concurrency of sentence is appropriate. The only way in which a parolee who violates parole can be afforded the opportunity to have a portion of his sentence run concurrently with another sentence, as contrasted to receiving full or no concurrency, is for the Board to execute the warrant while the parolee is in custody under the inter-

vening sentence. If he is reinstated to parole, he is in the constructive custody of the Attorney General through the Parole Board. If parole is revoked the Attorney General exercises constructive custody of the parolee through the Bureau of Prisons even though the place of physical custody remains unchanged. In either case the parolee is getting credit against both his sentences -- State and Federal.

The refusal of the Board to give a parole violation hearing at a time when it can exercise the full range of its discretion -- including execution, with resulting concurrency of sentences -- deprives the parolee of an opportunity to obtain the extent of concurrency which he is entitled to receive and which is appropriate in his case. Delaying the hearing until completion of sentence leaves the Board with the power to grant a fully retroactive sentence which may not be appropriate and which, for that reason, the Board may reject as a disposition.*

* In Orr v. Saxbe, supra, the Court held there could be no grievous loss because the Board could shorten the time required to be served on the remaining unexpired term. However, the Court fails to consider that this does not reduce the total sentence, and that the parole term will thereby be made longer.

The denial of a prompt proceeding resulting in loss of opportunity to receive a disposition permitted under the rules is a violation of the Constitution. United States v. Roberts, 515 F.2d 642 (2d Cir. 1975) (where a delay in trial deprived the defendant of the opportunity to be treated as a young adult offender).

Smith v. Hooey, 393 U.S. 374 (1969), and its progeny hold that the loss of the opportunity for concurrent sentences caused by an unreasonable trial delay is a constitutional violation. Smith holds that a prisoner of one jurisdiction who has lodged against him a detainer from another jurisdiction may be prejudiced by a delay in resolving the status of the detainer:

At first blush it might appear that a man already in prison under a lawful sentence is hardly in a position to suffer from "undue and oppressive incarceration prior to trial." But the fact is that delay in bringing such a person to trial on a pending charge may ultimately result in as much oppression as is suffered by one who is jailed without bail upon an untried charge. First, the possibility that a defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed. Secondly, under procedures now widely practiced, the duration of his present imprisonment may be increased, and the conditions under which he must serve his sentence greatly worsened, by the pendency of another criminal charge outstanding against him.

And while it might be argued that a person already in prison would be less likely than others to be affected by "anxiety and concern accompanying public accusation," there is reason to believe that an outstanding untried charge (of which even a convict may, of course, be innocent) can have fully as depressive an effect upon a prisoner as upon a person at large.

(Id., 393 U.S. at 378-379
Footnotes omitted.

See Strunk v. United States, 412 U.S. 434, 439 (1973); Dickey v. Florida, 398 U.S. 30 (1970). The same rationale applies to parole proceedings. Hahn v. Revis, supra.

Appellant alleges in his petition that he was denied the opportunity to participate in an educational college program, to participate in a prison release program and that he lost certain privileges while in New York State custody and that this was due to the presence of the detainer.*

The adverse and prejudicial impact of detainees has been recognized by Congress and the courts. In the reports on the Interstate Agreement on Detainers Act (18 U.S.C. App. §2) Congress wrote:

The Attorney General has advised the committee that a prisoner who has had a detainer lodged against him is seriously disadvantaged by such action. He is in custody and therefore in no position to seek witnesses or to preserve his defense.

* This was no dispute that these consequences resulted from the detainer.

He must often be kept in close custody and is ineligible for desirable work assignments. What is more, when detainers are filed against a prisoner he sometimes loses interest in institutional opportunities because he must serve his sentence without knowing what additional sentences may lie before him, or when, if ever, he will be in a position to employ the education and skills he may be developing.

(1970 U.S. Code, Cong. and Admin. News 4866.

In Hahn v. Revis, supra, the Court stated:

We recognize that a detainer may result in a loss of privileges when a prisoner is serving a sentence and that it may substantially diminish the prisoners' prospects for parole.

(520 F.2d at 637)

To avoid these results, Federal courts have directed that federal institutions give no effect to unprocessed state detainers lodged against residents of the federal institution. Wingo v. Ciccone, 507 F.2d 354 (9th Cir. 1974); Mattingly v. Ciccone, 503 F.2d 503 (8th Cir. 1974); McEachern v. Henderson, 485 F.2d 694 (5th Cir. 1973); see also, Shelton v. Meier, 485 F.2d 117 (9th Cir. 1973).*

* Under Braden v. Kentucky, 410 U.S. 484 (1973), an inmate can challenge the validity of a state detainer in the federal court in the state after he has exhausted state remedies.

Under George v. Nelson, 399 U.S. 224 (1970), the effects of state detainers on the custody in another jurisdiction can be challenged in federal courts of custodial jurisdiction after the state remedies of the custodial jurisdiction are exhausted.

Here there is no such problem. The parolee has requested the relief from a federal detainer and the federal parole board has denied it.

It would be ludicrous if the federal courts failed to protect against unconstitutional conduct by the Federal Board. See also Cooper v. Lockhart, supra; Cleveland v. Ciccone, supra; United States v. Condeleria, 131 F. Supp. 797, 805 (S.D.Cal. 1955); Lawrence v. Blackwell, 298 F. supp. 768, 713-4 (N.D.Ga. 1969).*

E. The cases in conflict

As noted earlier, the Fourth, Fifth, and Tenth Circuits have held that Morrissey does not require that a parole revocation hearing be held prior to the expiration of the intervening sentence. The argument articulated to support this position is that under 18 U.S.C. §4207, no hearing is required until the warrant is executed and that to compel the Board to execute the warrant eliminates the discretion in disposing of a case because execution starts the time running and automatically produces concurrent sentences. Cook v. United States Attorney General, 488 F.2d 667 (5th Cir. 1974):

Both statute and precedent confirm that execution of the warrant is the operative factor in triggering the availability of the hearing.

(488 F.2d 671)**

* In Orr v. Saxbe, supra, the Court assumes the same deprivations will be imposed based on the fact that the inmate committed a crime while on parole even if no detainer is lodged. There is no authority for this proposition.

** The District Courts of the Fifth Circuit are divided, Pavia v. Hogan, supra, refusing to follow Cook and Burnett because of Morrissey and Wolff v. McDonnell, supra, and Gray v. Hogan, 388 F. Supp. 476 (N.D.Ga. 1975), adhering to the Circuit decisions.

See also Small v. Britton, supra, 500 F.2d at 301

This reasoning puts form over substance. It is the act of lodging the detainer that denotes the interest of the Board in pursuing the violation, Cleveland v. Ciccone, supra, 517 F.2d at 1087, and which produces the adverse consequences to the parolee. Further, this approach does not square with the Board's own rules of procedure. As was noted earlier, the Board can let the warrant stand, execute it, or withdraw it. Under the Board's own rules, the Board gives a review or the discretionary dispositional interview (28 C.F.R. §2.53(a)). The interview is deemed a full hearing if the Board makes a prior decision to execute the detainer (28 C.F.R. §2.54(b)(4)). Consequently, it is the decision of the Board to treat the custody of the parolee by another jurisdiction as Federal custody -- and not the review or interview -- which results in execution of the warrant. Since the Board's own rules provide for this procedure with an interview, it is inconceivable that a true parole violation hearing cannot be treated identically. United States ex rel. Hahn v. Revis, supra, 520 F.2d 632. Indeed, the hearing would enable the Board to make a more informed judgment as to how to proceed.

If the cases are concerned with the definition of "retaken" as that word appears in §4207, it can appropri-

ately be redefined so that it is in accord with the constitutional requirements of due process.

It is also said that a delayed hearing works to the advantage of the parolee, who then has time to build up a good prison record for presentation to the Board at the conclusion of the parolee's intervening sentence. Gaddy v. Michael, supra, 519 F.2d at 675. This reasoning is contrary to the Board's own procedures, which state that a parolee serving a new sentence shall be advised that he may communicate

. . . with the Board relative to disposition of the warrant, and may request that it be withdrawn or executed so his violator term will run concurrently with his new sentence.

28 C.F.R. §2.53(a)

If the parolee believes that a hearing should be delayed, he surely has the option, even under the Board's perception of the procedure, to request that. However, where the delay will deprive the parolee of the opportunity to achieve the disposition that is both most realistic and beneficial the Board cannot unilaterally determine that it would be in the parolee's best interest not to have the hearing. Further, if the Board believes that execution of the warrant is not the proper disposition, it can let the warrant stand. 28 C.F.R. §2.53(b)(1).

Cases had also held that the loss of the opportunity of concurrency of sentence, or the adverse effects on conditions of custody due to the pendency of the detainer are not prejudicial effect of constitutional or substantial dimension. This reasoning is contrary to Smith v. Hoey, supra, and Wolff v. McDonnell, supra.

The cases that hold that a delayed hearing is permitted, but remediable if there is "grievous loss" (Orr v. Saxbe, supra; Small v. Britton, supra; Cf. Gaddy v. Michael, supra), take a narrow view of prejudice. They limit prejudice to a loss evidence that would be unavailable when the parole revocation proceeding is finally given at the conclusion of the sentence. As noted, however, the loss of the opportunity for concurrency and the increased severity of conditions of confinement are losses which cannot be remedied. It is not sufficient to say that the Board would not have granted concurrency by execution of the warrant even if a timely and fair hearing had been granted. There is simply no way of knowing what the Board would have done after such a hearing. N.L.R.B. v. District Council, 363 F.2d 204 (9th Cir. 1966).*

* One of the true curiosities in the opinion relied upon by the Board, Gaddy v. Michael, 519 F.2d 669 (4th Cir. 1975), is that it rejects the need for a parole violation hearing within a specified number of days in favor of the balancing approach adopted in speedy trial cases, citing Barker v. Wingo, 407 U.S. 514 (1972). Barker, of course, considers a balancing of prejudice cause by the delay, the reason for the delay, and the length of the delay. However, instead of balancing those elements, Gaddy dogmatically concludes:

Equally settled is the rule that where a warrant has been properly issued within the maximum term of the sentence, the execution of that warrant may be held in abeyance for the service of an intervening sentence and again such delay is reasonable.

(Id., 519 F.2d at 674)

It must be noted that this Court has held that the error in delaying a revocation hearing can be cured by the granting of late but fair hearings where the parolee can show no prejudice due to the delay. United States ex rel. Blassingame v. Gengler, 509 F.2d 1388 (2d Cir. 1972); United States ex rel. Buono v. Kenton, 287 F.2d 534 (2d Cir. 1961).* Compare United States ex rel. Hitchcock v. Kenton, 256 F. Supp. 296 (Conn. D.C. 1966). However, any delay in the hearing produces a delay in the opportunity to present mitigating circumstances justifying re-release. Moreover, in cases where the United States Board of Parole lodges a detainer against an individual in another institution and fails to give a parole revocation hearing, the delay results in a lost opportunity to obtain concurrent sentences, and this cannot be cured by a hearing no matter how fair.

The parole hearing by statute, §4207, has as its purpose to determine whether parole should be revoked. Morrissey recognized the need for consideration of facts other than those concerning the violation in order to determine whether the parolee should remain at liberty. On this ques-

* These case did not deal with an intervening sentence but with a parolee in custody for the crime which was the basis for the parole jurisdiction. Thus, there was no loss of prison time.

tion, Morrissey made no distinction between types of violations. Indeed, 73.7% of federal parole violations are based on new crimes.* Nonetheless, there is no indication that the Court intended to restrict Morrissey to the small remaining group. The principles of that decision are properly applicable in all parole revocation proceedings.

CONCLUSION

FOR THE ABOVE-STATED REASONS
THE ORDER BELOW MUST BE RE-
VERSED, AND THE APPELLANT DE-
TAINER WITHDRAWN WITH PREJU-
DICE.

Respectfully submitted,

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* Annual Report of Board, supra at 27

CERTIFICATE OF SERVICE

March 26, 1976

I certify that a copy of this brief and appendix
has been mailed to the United States Attorney for the
Northern District of New York.

Ryan J. Feeney